



LABOR & EMPLOYMENT DEPARTMENT

# ALERT

## U.S. SUPREME COURT HOLDS VERBAL COMPLAINTS PROTECTED UNDER FLSA'S ANTI-RETALIATION PROVISION

By Ian W. Siminoff

On March 22, 2011, in *Kasten v. Saint-Gobain Performance Plastics Corp.*, the United States Supreme Court held that the FLSA's anti-retaliation provision encompasses verbal complaints.

The Court left open the other significant question raised by the facts: whether or not retaliation protection applies to complaints made to private employers, as opposed to government bodies. While there remains a circuit court split on this issue, most courts have held that complaints to employers are protected.

### The *Kasten* Facts

From October 2003 to December 2006, Kevin Kasten worked as an hourly paid production worker in the Portage, Wisconsin, facility of Saint-Gobain Performance Plastics Corp., a manufacturer of a variety of high-performance materials.

In February, August and November 2006, Kasten was disciplined for failing to properly punch in and out. Presumably seeing the writing on the wall concerning his inevitable termination, Kasten purportedly made several verbal complaints to his superiors and HR between October and December 2006 regarding the location of the timeclocks. More specifically, he alleged that the timeclocks' location, between the area where workers put on and took off their work-related protective gear and the area where they carried out their assigned tasks, prevented workers from being paid for all compensable time worked, in violation of the FLSA. Kasten was terminated on December 11, 2006, following another timeclock infraction.

Kasten filed a complaint, alleging that his termination was not based upon his timeclock violations, but rather based upon his complaints about the location of the timeclocks. The Wisconsin District Court dismissed Kasten's complaint, holding that the FLSA's anti-retaliation provision did not apply to verbal complaints. The 7th Circuit affirmed on that basis.

### Does the Phrase "Filed Any Complaint" Encompass Verbal Complaints?

The simple question before the Supreme Court was whether the FLSA's anti-retaliation provision applies to verbal (as opposed to written) complaints.

The FLSA's anti-retaliation provision forbids employers:

"to discharge or in any other manner discriminate against any employee because such employee has **filed any complaint** or instituted or caused to be instituted any proceeding under or related to [the Act], or has testified or is about to testify in such proceeding, or has served or is about to serve on an industry committee." (emphasis added)

The Court explained that the definitional and textual interpretation of "filed any complaint" was inconclusive on the issue. It went on to hold that the phrase must encompass oral complaints because limiting the phrase to written complaints would undermine the FLSA's objective of protecting illiterate, less educated and overworked workers, who have difficulty submitting written complaints. The Court also explained that such an

interpretation might also interfere with the Department of Labor's acceptance and processing of oral complaints, a practice that has been in place for years.

#### **What Constitutes a Protected Verbal Complaint?**

Addressing concerns raised by Saint-Gobain, the Court explained that the phrase "filing any complaint" contemplates some degree of formality, certainly to the point where the recipient has been given fair notice that a grievance has been lodged and does, or should, reasonably understand the matter as part of its business concerns. Said another way, a complaint is "filed" when "a reasonable, objective person would have understood the employee to have put the employer on notice that the employee is asserting statutory rights under the Act." The Court further emphasized that an oral complaint must be "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection."

The Supreme Court remanded the case to the lower courts to decide whether or not *Kasten's* verbal complaints met this notice standard.

#### **The Implications for Employers**

The *Kasten* ruling is certain to increase the burden on supervisors and HR personnel to decipher whether or not an employee's concerns about wage and hour conditions constitute protected activity under the FLSA's anti-retaliation provision. Given the breadth and ambiguity of the *Kasten* decision, employers should err on the side of caution in making such a determination. Employers should also implement procedures for the handling and investigation of internal wage-and-hour complaints, and train supervisors concerning same. Employers will need to tread very carefully in taking adverse action against an employee who has lodged a verbal wage-and-hour complaint so as to not run afoul of the FLSA's anti-retaliation provision.

For more information about this Alert, please contact Ian W. Siminoff at 973.994.7507 or [isiminoff@foxrothschild.com](mailto:isiminoff@foxrothschild.com) or any member of Fox Rothschild's Labor & Employment Department.



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